

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**GALYEN PETROLEUM COMPANY, a
Nebraska corporation,**

Plaintiff,

vs.

**LEROY BLITZKIE; GARY BURIVAL;
DENNIS GRAIN, INC., d/b/a O'NEILL
GRAIN; AG ACCEPTANCE
CORPORATION; O'NEILL FERTILIZER,
INC.; COMMODITY CREDIT
CORPORATION; NEBRASKA STATE
BANK; and FARMERS HOME
ADMINISTRATION, O'NEILL,**

Defendants.

Case No. CI99-197

**INTERLOCUTORY
SUMMARY JUDGMENT**

DATE OF HEARING: November 2, 2000.

DATE OF RENDITION: November 6, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff: Janet L. Krotter-Chvala.

For defendants:

AAC: Tim W. Thompson.

OFI: Thomas P. Herzog.

Others: No appearances.

SUBJECT OF ORDER: Defendant Ag Acceptance Corporation's motion for summary judgment against defendant O'Neill Fertilizer, Inc.

PROCEEDINGS: At the hearing, these proceedings occurred:

Opening statements were made by counsel for Ag Acceptance Corporation and O'Neill Fertilizer, Inc. Evidence was adduced. Ag Acceptance Corporation offered Exhibit 1, the Affidavit of Norman L. Fiddelke, in support of its motion for summary judgment. O'Neill Fertilizer, Inc., offered Exhibit 2, a duplicate copy of its fertilizer lien, in opposition to the motion. Both exhibits were received into evidence

and the parties rested. The attorneys for Ag Acceptance Corporation and O'Neill Fertilizer, Inc., then presented closing arguments. The matter was taken under advisement.

FINDINGS:

The court finds and concludes that:

1. The decision in *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, ___ N.W.2d ___ (2000), restates the oft-repeated principles that control this decision:

a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

d. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

2. The action has previously been dismissed as against the defendants Burival, Dennis Grain, Inc., Commodity Credit Corporation, Nebraska State Bank, and Farmers Home Administration. The action now pertains to crop proceeds paid in to the clerk of this court pursuant to interpleader.

3. At hearing, the plaintiff offered no evidence, and does not resist the motion, which is directed only to the defendant O'Neill Fertilizer, Inc.

4. The defendant Ag Acceptance Corporation has a valid, filed and perfected lien on crops belonging to the defendant LeRoy Blitzkie. The liens were filed in Boyd and Holt Counties on or about April 19 and April 20, 1999. The defendant O'Neill Fertilizer, Inc., has a valid fertilizer lien on crops owned by the defendant LeRoy Blitzkie. The fertilizer lien was filed on or about November 2, 1999. There was no contract in writing between defendant Ag Acceptance Corporation and defendant O'Neill Fertilizer, Inc. providing for the priority of O'Neill Fertilizer, Inc.'s fertilizer lien over prior lienholders. As

a matter of law, the liens of defendant O'Neill Fertilizer, Inc., are inferior and subordinate to the liens of defendant Ag Acceptance Corporation, pursuant to Neb. Rev. Stat. § 52-1103. In order for the fertilizer lien of O'Neill Fertilizer, Inc. to have priority over prior lien of Ag Acceptance Corporation, it would have required a contract in writing agreeing to such a priority.

5. As between Ag Acceptance Corporation and O'Neill Fertilizer, Inc., there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that Ag Acceptance Corporation is entitled to judgment as a matter of law

6. The amount of proceeds held by the clerk is less than the lien amounts owing to Ag Acceptance Corporation. Consequently, no proceeds will remain for distribution to O'Neill Fertilizer, Inc.

7. Because the motion pertained only to the issues between Ag Acceptance Corporation and O'Neill Fertilizer, Inc., the judgment is interlocutory. The issues as between the plaintiff and the remaining defendants have not yet been determined by this action.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. Interlocutory summary judgment is entered on the defendant Ag Acceptance Corporation's cross-petition against defendant O'Neill Fertilizer, Inc., in favor of the defendant Ag Acceptance Corporation and against the defendant O'Neill Fertilizer, Inc., determining that Ag Acceptance Corporation shall have a priority interest over O'Neill Fertilizer, Inc., in the interpleader funds previously paid into court as part of this action.

2. Interlocutory summary judgment is entered on the defendant O'Neill Fertilizer, Inc.'s cross-petition against defendant Ag Acceptance Corporation, in favor of the defendant Ag Acceptance Corporation and against the defendant O'Neill Fertilizer, Inc., dismissing the cross-petition of defendant O'Neill Fertilizer, Inc. as against the defendant Ag Acceptance Corporation with prejudice.

3. The matter shall proceed to telephone progression conference as to all remaining issues as previously scheduled for **November 14, 2000, at 1:30 p.m.**

Signed in chambers at Ainsworth, Nebraska, on November 6, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

• Mail a copy of this order to all counsel of record and to any pro se parties.

9 Done on _____, 20____ by ____.

Enter judgment on the judgment record.

9 Done on _____, 20____ by ____.

Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 20____ by ____.

• Note the decision on the trial docket as: [date of filing] Signed
“Interlocutory Summary Judgment” entered.

Done on _____, 20____ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge